BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

IN THE MATTER OF THE GENERIC PROCEEDINGS CONCERNING ELECTRIC RESTRUCTURING	DOCKET NO. E-00000A-02-0051
IN THE MATTER OF ARIZONA PUBLIC SERVICE COMPANY'S REQUEST FOR VARIANCE OF CERTAIN REQUIREMENTS OF A.A.C. 4-14-2-1606	DOCKET NO. E-01345A-01-0822
IN THE MATTER OF THE GENERIC PROCEEDING CONCERNING THE ARIZONA INDEPENDENT SCHEDULING ADMINISTRATOR	DOCKET NO. E-00000A-01-0630
IN THE MATTER OF TUCSON ELECTRIC POWER COMPANY'S APPLICATION FOR A VARIANCE OF CERTAIN ELECTRIC POWER COMPETITION RULES COMPLIANCE DATES	DOCKET NO. E-01933A-98-0471
ISSUES IN THE MATTER OF TUCSON ELECTRIC POWER COMPANY'S APPLICATION FOR A VARIANCE OF CERTAIN ELECTRIC COMPETITION RULES COMPLIANCE DATES.	DOCKET NO. E-01933A-02-0069

CLOSING POST-HEARING BRIEF OF ARIZONA PUBLIC SERVICE COMPANY ON "TRACK B" ISSUES

Pursuant to the presiding Administrative Law Judge's direction, Arizona Public Service Company ("APS" or "Company") submits to the Arizona Corporation

Commission ("Commission") this Closing Post-Hearing Brief on Track B issues ("Closing Brief").

I. INTRODUCTION

As is evident from Staff's Initial Brief, there is significant consensus between APS and Staff on many of the important issues in this proceeding. APS agrees that customer benefit is the underlying standard that should guide the Commission in deciding the issues that are raised in this proceeding. The customer benefit standard, however, begs the question of whether wholesale power procurement should be limited to that capacity and energy that cannot be produced by native generation and pre-existing contracts—the outcome intended by the Track A decision—or greatly inflated in an unintended and unprecedented fashion. APS does not believe that the Commission should embark on an untested, expansive procurement program untried anywhere in the country without any evidence that there is a present harm to customers that must be cured, and with no evidence that such an overly-aggressive solicitation mandate including economy energy and Reliability Must Run ("RMR") will actually result in customer benefits.

As discussed in the Company's Opening Brief, APS has successfully managed its power procurement in the past to benefit our customers. APS was one of only a handful of electric utilities able to actually provide rate reductions during the last few years while the rest of the industry was in turmoil. The customer benefit standard should allow APS to continue to procure economy energy in the same way that is has successfully used for years. And, contrary to the assertions of the merchant intervenors, this is not in any respect similar to the reliance on the spot market that contributed to California's energy crisis because economy energy is by definition already covered by utility-owned generation. An experiment in pre-bidding significant amounts of such economy energy may result in prices which, while perhaps less than the anticipated estimate of costs for some specific APS generation units, may be above the price at which APS could have

otherwise acquired the energy using its current practices. It may also result in the acquisition of energy that is simply unneeded at any price. No party presented evidence that any other jurisdiction has even suggested that economy purchases be competitively bid far ahead of when needed. Similarly, no party presented evidence to show that competitively bidding RMR capacity—where there is both limited competition and significant development risk for future transmission and generation projects—was sound, risk-minimizing policy.

In both cases, APS believes that the risk to customers of an untested, mandated procurement policy, based on a "more is better" bidding philosophy, and not on practice or experience, is too great. Accordingly, APS believes that these two issues are experiments best left for another day or which should at least be modified as proposed by the Company in its testimony. (*See* T. Carlson Rebuttal Test. at pp. 10-13.) As to other matters, the Company's positions are as set forth in its Initial Post-Hearing Brief ("APS Brief"), as amplified in this Closing Brief. Thus, the remainder of this Closing Brief will respond to issues or matters raised by other parties, organized generally by issue.

II. UNMET NEEDS

APS agrees with Staff that one of the primary issues to be addressed in Track B is the amount of APS "contestable load" that should be subject to the initial solicitation, but continues to believe that the appropriate method for determining that contestable load, particularly for the initial solicitation, is to use the best current estimate of APS' unmet needs, *i.e.*, the APS capacity and energy needs that cannot be met by APS' own existing assets. (*See* P. Ewen Direct Test. at 2-3; P. Ewen Rebuttal Test. at 2-5 and Schedule PME-3R; APS' Brief at 4-6.) Using APS' estimate of unmet needs is the method most consistent with the language contained in Decision No. 65154 and with the Commission's discussion in that same Decision, and reiterated by Staff at the hearing, of the

uncertainties of the market and the resulting need to carefully phase in wholesale competition.

None of the opening briefs raised new substantive issues regarding the APS calculation of unmet needs that require further response beyond those comments APS has already submitted in this docket. Although APS finds the numbers set out in Staff Exhibit S-5 to be acceptable estimates of what they purport to be (with the caveat that RMR numbers may be revised upon completion of the ongoing study), those numbers are still estimates based on the information then currently available and should not be viewed as any definitive indication of what APS may ultimately procure through the solicitation process. Moreover, as discussed further below, even though the Staff estimates of RMR and economy energy may be reasonable, APS believes that it is inappropriate to include RMR and economy energy in the Track B solicitation process.

Although most parties appear to accept the Staff Exhibit S-5 *numbers* as reasonable estimates of what they are intended to represent, APS is concerned that certain merchant intervenors continue to promote the use of what is now known to be superceded data that APS provided in August 2002 or to propose methods of calculating APS' contestable load that have no relation to the Company's unmet needs in a way that benefit the merchants to the disadvantage of APS and its customers. Both Harquahala and Panda/TECO argue that their calculations of APS' unmet needs must be correct just because their numbers are close to the numbers originally included by Staff in the Staff Report, but later repudiated by Staff. (Harquahala Brief at p. 2; Panda/TECO Brief at p. 8, fn. 24.) Harquahala goes so far as to imply that an average of its, Staff's and Panda/TECO's numbers may be appropriate, despite the fact that neither Harquahala's nor Panda/TECO's calculations have any factual basis.

III. SOLICITATION PROCESS AND ECONOMY ENERGY

APS agrees with Staff that specifics regarding the process and products must be left to the utility, including the discretion to reject bids that the utility believes are not appropriate. (Staff Brief at p. 7.) In contrast, the merchant intervenors each argue that the solicitation process should be altered or circumscribed in some manner that favors the seller's individual circumstances rather than the buyer's needs. Harquahala, for example, argues that APS' proposal for economy energy mismatches the products that APS is demanding "with what the market largely has constructed." (Harquahala Brief at p. 4.) It is not, however, the seller's needs that are the proper focus of Track B. (*See* Staff Brief at p. 7.)

Panda/TECO's arguments are even more unsupportable. While disingenuously asserting that each "utility shall determine the specific products it will contract for" (Panda/TECO Exhibit at 20), it then rewrites the Staff Report itself to detail precisely the product that Panda/TECO wants to sell, down to the type of product (dispatchable pay-for-performance PPAs and physical call options), the availability guarantees that APS is to seek, liquidated damages, and the type of solicitation to be employed for each of these products (Panda/TECO Exhibit at 21). As in other portions of its Brief, Panda/TECO seeks to eliminate as much utility discretion (and competition) as it can.

Reliant argues that an auction rather than an RFP should be used for the solicitation. (Reliant Brief at pp. 6-9.) APS does, at present, favor an auction for future procurements, but there is insufficient time now to develop an auction and accommodate all of the potential variables that are still at issue in this proceeding (e.g., how will RMR be treated, will environmental issues need to be addressed, how is deliverability to be determined under a straight auction model, etc.) (*See* Tr. vol. III at p. 656 [T. Carlson].) Thus, unless Reliant and others propose postponing the solicitation until 2004, APS believes that an RFP must be used for at least this first solicitation. Similarly, while APS

shares Sempra's concerns that the timing in the Track B process may be too short, it does not favor significantly shortening tasks needed to structure the solicitation. (Sempra Brief at pp. 9-10.) And, although APS expects there will be some feedback from parties (such as from the bidders' conference), if every step of the solicitation is open to challenge and litigation by the sellers, the Staff timelines cannot be met for a 2004 solicitation, let alone one in 2003.

Several parties, including Sempra and Wellton-Mohawk, also argue that the contract lengths solicited should be required to be significantly longer than the 3-4 year period that Staff acknowledged was most likely appropriate and for which APS presently proposes to target its solicitation. While good for the seller, this argument ignores the increasing risks associated with longer term contracts. These include very significant counter-party credit risk, regulatory risk, the potential implications of FERC's SMD initiative, changes in future system needs, and potential customer attrition to Direct Access in later years. While APS will (contrary to Panda/TECO's claim, *see* Panda/TECO Brief at p. 13) consider bids for longer than the period covered by this solicitation (T. Carlson Rebuttal Test. at p. 17), APS should not be required to solicit for such products.

Parties who advocated soliciting for essentially all of the Company's economy energy have not presented any justification to depart from either the Track A order or the method that the Company employs for economy energy today. Some merchant generators blatantly misstate both the nature and the appropriate standard for procuring economy energy.[1] Because economy purchases are by definition covered by existing APS generation, they do not result in the type of unhedged "spot market" reliance that has been

[1] Panda/TECO attempted to imply in its Brief that APS somehow misrepresented the actual capability of its native generation and pre-existing contracts to "reliably or economically" serve APS customers and that it would therefore resort to a "sudden reliance" on the spot market in its Track B proposal. (Panda/TECO Brief at p. 10.)

rightly criticized in other jurisdictions. (T. Carlson Rebuttal Test. at pp. 8-10; R. Rosen Rebuttal Test. at pp. 5-6.) Also, because APS has long used economy purchases to reduce its energy costs to customers, the appropriate benchmark for determining whether pre-bidding economy purchases is better for customers is not simply whether a generator can beat a current estimate of the future operating costs of a particular APS generator. Rather, the correct questions are whether (1) placing restrictions on how APS procures economy energy in Track B and (2) requiring the procurement to occur far earlier than would otherwise be the case yield a better result than simply continuing with an already proven and successful economy energy program. None of the briefs cite any evidence that a departure from Decision No. 65154 and from the status quo will yield better results for customers than are realized by APS today. If the Commission believes a change is nonetheless appropriate, APS believes that the compromise proposal made by Mr. Carlson is the least-harmful way to test the viability of a formal solicitation process for economy energy.

IV. RMR AND TRANSMISSION

There appeared to be general consensus with allowing RMR and deliverability issues to be addressed by the forthcoming RMR studies. However, no party presented persuasive evidence that would support competitively bidding for both APS and non-APS RMR capacity. Some parties suggested that it would be appropriate to "test" the market, but fail to explain what happens if the "test" fails or why an already aggressive procurement should be further complicated with an RMR procurement for already existing APS generation—an approach that is untried anywhere in the country. (*See, e.g.,* Harquahala Brief at p. 6; PPL Brief at p. 7; Panda/TECO Brief at pp. 7-8; Sempra Brief at p. 7; Wellton-Mohawk Brief at pp. 7-13; Staff Brief at p. 4.) Moreover, there was no evidence presented to establish that making already rate-based generation assets contestable (other than for purchases of economy energy, as occurs today) will benefit

customers. Indeed, Sempra's suggestion that a new "stranded cost" proceeding could or should be initiated for displaced APS generation appears to miss the entire point of the Track A order, which directed APS not to divest generation and specifically recognized concerns over divesting must-run generation. (Sempra Brief at p. 7.) Expending significant funds and efforts on another round of stranded cost proceedings is not something that APS thinks appropriate at this time, unless it is forced to do so by actions in this proceeding. Thus, competitively bidding all RMR is an issue that should be left for another day.

Wellton-Mohawk's discussion further illustrates the flawed analysis of competitively soliciting for RMR. First, Wellton-Mohawk suggests that one of Staff's goals is to have more local generation constructed. (Wellton-Mohawk Brief at p. 7.) However, Staff's position on RMR has generally been to focus on transmission solutions, not more local generation. For example, in the Phoenix area there has been new local generation constructed (West Phoenix CC 4 and CC 5), which has not resulted in the elimination of RMR in Phoenix from Staff's standpoint, because the RMR analysis depends on transmission import limits. (*See* J. Smith Rebuttal Test. at p. 2.) Second, Wellton-Mohawk inexplicably proposes (apparently) that even generation not owned by APS that is electrically located within a load pocket should somehow be made contestable. (Wellton-Mohawk Brief at p. 6.) Such an argument would, if taken literally, seem to make SRP-owned local generation in Phoenix somehow contestable. It also would impose added customer costs in Yuma to "solve" a non-existent problem. Specifically, Wellton-Mohawk claims that APS discussion of the Yuma situation "is without support or logic." (*Id.* at p. 10.) However, the fact that APS can take advantage of local generation support provided by two non-APS units that sell outside the Yuma area at no cost to APS customers and use APS local generation only when necessary, does not support requiring APS to buy products from Wellton-Mohawk that APS does not need.

(*See* T. Glock Rebuttal Test. at pp. 5-6; Tr. vol. III at pp. 664-67 [T. Glock].) Moreover, Wellton-Mohawk's assertion that it will be "within" the Yuma load pocket has not been established—the plant is located east of Yuma and may deliver to substations that are currently considered to be outside the local Yuma cut-plane. Ultimately, many of Wellton-Mohawk's efforts to over-dramatize the RMR situation in Yuma are simply an attempt to create more of a market for their project—a project which as of yet has no Certificate of Environmental Compatibility and no known financing—than would otherwise be the case.

V. STANDARDS OF CONDUCT

APS appreciates Staff's recognition that the Standards of Conduct to be proposed by APS should strive for "separation of information, rather than complete separation of function" because "there are shared services between APS and [Pinnacle West Capital Corporation ("Pinnacle West")] that cannot realistically be separated or reorganized," particularly in time for the first solicitation. Staff's analysis gives appropriate recognition to the historical structure and operation of Pinnacle West, while proposing a general process that protects the integrity of the solicitation process. As Staff implicitly acknowledges, it is both unrealistic and impractical (if not impossible) to erase years of knowledge, especially when that knowledge will be used to the benefit of APS and its customers.

Several of the merchant intervenors, however, either do not recognize those issues or recognize them but nonetheless propose restrictions that would in effect preclude the Pinnacle West Energy Corporation ("PWEC") plants from participating in the competitive solicitation, a result that would benefit the merchants to the disadvantage of APS and its customers, or make assertions apparently intended only to confuse issues. While arguing that APS should "treat all potential suppliers on fair and equal terms" (Panda/TECO Brief

at p. 3), they propose restrictions that would instead put PWEC at a competitive disadvantage.[2] The Commission should reject such restrictions.

Panda/TECO's assertion that the Commission should require APS to "simply" treat any merchant generator equally in all respects is, of course, not nearly as simple as represented. (*See* Panda Brief at p. 21; Tr. vol. III at p. 613 [S. Wheeler].) For example, because APS uses Pinnacle West legal, environmental or human resources support certainly does not require Pinnacle West to make such services available to any merchant generator. Likewise, using Panda/TECO's example, system conditions may make it easier for APS to accept test energy from one merchant plant at one specific time while warranting different terms at a later time. Panda/TECO goes so far as to state that its proposal would "preclude any reliability based factual differences from being taken into account" (Panda Brief at p. 21, n. 65), let alone any issues relating to customer benefits. Further, emergency or reliability conditions may require APS to use whatever resources are available—whether an affiliate, SRP, or a merchant generator—to avoid curtailing customers and without "offering" the same services to all parties. And, contrary to Panda/TECO's argument, any issues relating to APS' provision of wholesale services or ancillary services are FERC jurisdictional. *See* 16 U.S.C. § 824 (b); *see also Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 691 (D.C. Cir. 2000), *aff'd sub nom*, 535 U.S. 1 (2002).

The Commission should also reject Panda/TECO's and Harquahala's misrepresentations of both the nature of the services that APS may have provided to

[2] For example, although Harquahala does not actually suggest any revisions to the proposed Code of Conduct, it implies that APS should not include on the procurement team any employees that have worked for Pinnacle West, provide shared services or, perhaps most offensive, own Pinnacle West stock. (Harquahala Brief at p. 7.) Panda/TECO would go so far as to require APS to post on the solicitation website and make available on the same terms to the merchants generators *any* transactions between APS and an affiliate, regardless of whether it had anything to do with procurement of energy or capacity. (Panda/TECO Brief at p. 22.) Such proposals clearly go beyond "leveling the playing field," and are intended to effectively preclude Pinnacle West from participating in the solicitation process—a result that benefits only the merchant intervenors.

PWEC and APS' rights to gas transportation capacity. Without any citation to the record, Harquahala implies that because APS has provided network transmission service to Pinnacle West, APS has somehow discriminated against Harquahala. (Harquahala Brief at 7.) Harquahala fails to point out, however, that the specific PWEC plants that have been designated network resources have been so designated because those plants are fully constructed and actually providing service to APS. Harquahala's plant is not completed yet and currently has no contracts to serve APS customers so, clearly, it cannot be designated a network resource. Moreover, the continuing attempts by both Harquahala and Panda/TECO to confuse the issues relating to the APS/PWEC transportation service agreement ("TSA") with El Paso Natural Gas also should be rejected. As APS has explained repeatedly, APS and PWEC are co-shippers on the TSA, each with their own individual rights, and the determination of those respective rights currently is before the Federal Energy Regulatory Commission ("FERC"). (Tr. vol. III at p. 615 [S. Wheeler]; *see also* Tr. vol. I at 205-206 [J. Smith].) Moreover, APS has clearly stated that, although it does not believe it is required to offer its own gas transportation capacity to anyone just because they want it (Tr. vol. III at 614 [S. Wheeler]), it does believe the TSA allows it to use its own gas capacity through a tolling arrangement with *any generator* (Tr. vol. III at 616-618 [S. Wheeler]; *see also* Panda/TECO Exh. 1).

Several of the merchant intervenors also apparently have not yet recognized the different purposes of the proposed Code of Conduct and the pending Standards of Conduct. In addition to the numerous existing federal and state requirements governing relations between APS and its affiliates (*see* APS Brief at pp. 16-17 for a summary and citations to the hearing transcript), APS submitted a proposed expanded Code of Conduct in response to the Track A order. That proposed Code of Conduct is intended to govern generally relations between APS and its affiliates engaged in retail or wholesale competitive activities. Because the solicitation process raises certain unique issues, Staff

proposed in the Staff Report, and APS is currently developing, Standards of Conduct that will apply specifically to the solicitation process. As proposed in the Staff Report and reiterated in Staff's opening brief, the Standards of Conduct will include monitoring by Staff and the independent monitor of the solicitation process. (Staff Report at 38; Staff Brief at 8.) That monitoring provides further assurance that APS will conduct the solicitation process in a fair manner.

Finally, as was also suggested by Staff, APS is identifying the team of employees that will conduct the solicitation and will take steps to ensure that they do not share inappropriate information with employees of APS affiliates who may be directly involved in the preparation of a bid in the solicitation process. APS will not, however, segregate those team members from "any contact with employees of the affiliate" because, based on a complete reading of Staff's discussion on the Standards of Conduct, APS does not believe that the Staff Report intended to preclude any and all contact with all employees of an affiliate and further believes that such a result would harm APS customers. Specifically, that result would preclude the team from accessing needed expertise, such as consulting legal counsel or in-house environmental experts, for example.

VI. ROLE OF THE INDEPENDENT MONITOR AND COMMISSION

APS agrees with Staff that the utility needs to be the decision-maker on the products, process and selection of winning bids. As noted in its Opening Brief, the Company does not oppose the independent monitor or Staff overseeing the process, but does ask that these parties raise any issues or concerns when there is still time to take corrective action, rather than wait until the end of the process to identify perceived problems. Panda/TECO's arguments that the independent monitor should run the solicitation are unwarranted. (Panda/TECO Brief at pp. 13-17.) Likewise misplaced is Panda/TECO's reference to a proposal by Mr. Davis in the Purchase Power Agreement ("PPA") proceeding, raised for the first time in its Brief and wholly out of context. (*Id.* at

p. 14.) That proceeding, of course, never went to hearing and is no longer under consideration by the Commission. Moreover, for the 270 MW auction referenced in the PPA proceeding, Mr. Davis's proposal for a third party manager to administer the solicitation would still have left APS with the full discretion as to which bids to accept or reject and for the products appropriate to solicit.

Panda/TECO's recommendation that APS be divested of its discretion if PWEC participates in the solicitation appears primarily aimed at eliminating PWEC as a competitor and reducing APS' ability to act prudently on behalf of its customers. It is also a position completely contrary to that taken by TECO's own utility affiliate, Tampa Electric Company, earlier this year in a Florida rulemaking proceeding. In that proceeding, which dealt with a much narrower rule addressing competitive bidding for new capacity requirements—not economy energy purchases, or specific RMR generation—Tampa Electric Company argued in opposition to a proposal that a third party conduct the solicitation:

> If an independent evaluator makes general selection decisions, then IOUs charged with providing an adequate and reliable supply of electricity will not be making the decisions for which they are accountable. The statutes are premised on holding utilities accountable for their management decisions. If the Commission [through the independent evaluator] assumes managerial functions, then it should not hold the utilities accountable for decisions the utilities do not and cannot make.[3]

Likewise, Panda/TECO argues that the Financing Application and the statement that APS may seek to ratebase the PWEC Reliability Assets somehow require a third party to run the solicitation. (Panda/TECO Brief at p. 17.) However, the mere fact that APS has publicly filed or discussed these matters does not mean that APS will conduct the Track B solicitation unfairly or in bad faith or that the independent monitor cannot appropriately

[3] Comments of Utilities Regarding Potential Revisions to Rule 25-22.082 (March 15, 2002), at p. 38. These Comments were filed jointly by the four primary Florida investor owned utilities with the Florida Public Service Commission and is a public record. Excerpts of the filed Comments are attached as Exhibit A. A complete copy can be downloaded at: http://www.psc.state.fl.us/PSCFiles/psc/library/filings/02/06764-02/06764-02.pdf

determine compliance without actually being the decision-maker. Thus, the Administrative Law Judge should reject Panda/TECO's assertion that merely filing the Financing Application and APS' statement that it would in the future ask the Commission for ratebase treatment of the PWEC Reliability Assets constitute a present "showing" of "impropriety." (*Id.*) While Panda/TECO will no doubt continue to litigate these and any other issues that could yield it a tactical advantage over APS, its customers, and the other potential Track B bidders, the propriety of those matters is for the Commission to determine, not Panda/TECO.

This very argument made by TECO, and which is quoted above, also highlights the maxim that the more restrictive the regulatory requirements for conducting a competitive solicitation, the more responsible the regulator must be for the results. Because the Track B solicitation proposes to restrict the manner by which APS procures power for its customers, APS continues to believe that prompt Commission approval of the results of the solicitation is appropriate. (Tr. vol. III at pp. 509-14 [S. Wheeler].) APS would not be so forcefully asking the Commission to pre-approve all of its contracts if it were able to continue using the procurement practices and discretion that it has successfully used without a Commission-imposed solicitation process. (*Cf.* Staff Brief at p. 7, arguing that there is no need to change the historical manner of conducting prudence reviews.) Indeed, Staff's argument on this point in its Brief, which notes Staff's legitimate concerns regarding the novelty of this type of solicitation in Arizona and potential defects in the wholesale market, merely proposes to shift all of the risk for this admittedly novel power solicitation from this equally defective wholesale market to the utility. (*See* Staff Brief at p. 6.)

VII. EPS, ENVIRONMENTAL RISK MANAGEMENT AND DSM

APS supports Staff's position on the Environmental Portfolio Standard, environmental risk management and the role of Demand Side Management. While these

are all significant issues, they should not complicate an already complex Track B solicitation with an already challenging implementation timeline. While APS does not oppose bidders such as Wellton-Mohawk offering environmental resources in the solicitation, the development of a specific evaluative method as proposed only by Mr. Kendall should be done, if at all, in a separate proceeding focused on these issues. (Wellton-Mohawk Brief at pp. 15-16.) Similarly, RUCO's call for a detailed integrated resource planning ("IRP") proceeding to address DSM and environmental issues admittedly could not be done on the timeline proposed by Staff. (RUCO Brief at pp. 7-9.) Further, such an IRP process, if done in the future, will necessarily be limited and constrained by procurement decisions previously made in the Track B solicitation.

VIII. CONCLUSION

APS complied with Decision No. 65154 in calculating its unmet needs. That Decision did not contemplate the inclusion of either RMR or economy energy purchases in the solicitation process. Moreover, including those purchases in the upcoming solicitation process serves merely to complicate the process without providing any certain benefit to APS or to APS customers and ignores the success that APS has had over the last couple of years in its procurement process.

In addition, the proposals by several of the merchant intervenors would circumscribe the solicitation process in a manner that favors them over APS. But favoring the merchant intervenors is not the goal of Track B—securing benefits for customers is the ultimate goal.

APS has undertaken numerous steps to address Staff's concerns regarding APS' relations with its affiliates. Not only has APS submitted a proposed expanded Code of Conduct, but it will submit to Staff for its review proposed Standards of Conduct that will apply directly to the solicitation process. The merchant intervenors, apparently ignoring both those standards and the anticipated role of Staff and the independent monitor in

monitoring the solicitation, continue to argue for unrealistic and unreasonable restrictions that would effectively preclude the PWEC plants from participating in the solicitation. While such a result would certainly benefit the remaining merchant generators, it can only serve to disadvantage APS and its customers. Staff's clearly more balanced approach should guide the Commission's consideration of this issue.

RESPECTFULLY SUBMITTED this 31st day of December 2002.

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Sharon R. Madden

MEMORANDUM

TO: Chairman Lila A. Jaber
Commissioner J. Terry Deason
Commissioner Braulio L. Báez,
Commissioner Michael A. Palecki,
Commissioner Rudolph "Rudy" Bradley

DATE: March 15, 2002

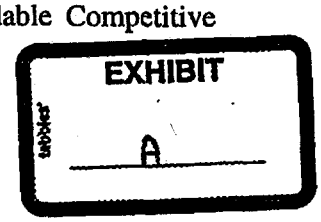
SUBJECT: Comments of the IOUs Regarding Potential Revisions to Rule 25-22.082, Florida Administrative Code, Selection of Generating Capacity

COMMENTS OF UTILITIES REGARDING POTENTIAL REVISIONS TO RULE 25-22.082

Florida's four investor-owned utilities ("IOUs") -- Gulf Power Company ("Gulf"), Tampa Electric Company ("TECO"), Florida Power Corporation ("FPC"), and Florida Power & Light ("FPL") -- together submit these consensus comments discussing whether or to what extent the Commission should amend Rule 25-22.082 (the "bid rule").

If the Commission wishes to keep a bid rule, the IOUs believe the existing rule effects the proper balance of all considerations. Most importantly, the bid rule protects the interests of the customer in having affordable and reliable electricity. As Commissioner Deason observed during the workshop on February 7, 2002 (the "Workshop"), the existing bid rule was not something the IOUs proposed or enthusiastically embraced when it was adopted. [Workshop Transcript at 98]. The bid rule originated with the Commission and its Staff, and, importantly, it represented an effort to strike an appropriate balance of the same competing considerations faced today. The bid rule favors neither IOUs nor Independent Power Producers ("IPPs"), but it is designed to further the interests of the customer.

The Commission lacks sufficient legislative authority to enact the straw proposal prepared by Staff or the alternative proposed by the Partnership for Affordable Competitive



Commission and FPC used the bidding process.[48] Panda's challenge to the Hines Unit 2 project took more than one year. IOUs already must factor delays from litigation into their capacity additions, and additional points of entry and opportunities to challenge Commission decisions will only increase this delay without providing great benefits to consumers. Such challenges increase costs to customers not only by increasing litigation expense, but because they delay engineering and procurement schedules.

C. Both Proposals Increase Regulatory Burden, Rather Than Lighten It

Both proposals include ideas that run counter to the Commission's stated goal of alleviating regulatory burden. For example, the independent evaluator included in the PACE alternative would not be held accountable for its decision and would invite litigation and further delay. From a policy standpoint, Florida's regulatory scheme imposes the obligation to serve on the IOU with regulatory oversight that the obligation will be discharged responsibly. If an independent evaluator makes generation selection decisions, then IOUs charged with providing an adequate and reliable supply of electricity will not be making the decisions for which they are accountable. The statutes are premised on holding utilities accountable for their management decisions. If the Commission assumes managerial functions, then it should not hold the utilities accountable for decisions the utilities do not and cannot make.

Introducing a third party evaluator into the bidding process is also impractical because of the certainty of further litigation. The process of appointing an independent evaluator will create an additional point of entry to litigate whether the evaluator is truly independent.

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[48] *See Panda Energy Intl. v. Jacobs*, Fla. Supreme Court No. SC01-284 (February 21, 2002).